TIMBERLINE PRODUCTION CO.

IBLA 85-837 Decided June 26, 1987

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, upholding an assessment based on an incident of noncompliance. W NRM 680.

Affirmed.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Civil Assessments and Penalties -- Oil and Gas Leases: Incidents of Noncompliance

On appeal from an assessment for failure to timely abate an incident of noncompliance (INC), the assessment will be affirmed where the INC is found to be proper and it is undisputed the operator did not achieve compliance within the time allowed. An inquiry of the Bureau of Land Management regarding the propriety of the INC will not ordinarily justify a failure to timely abate in the absence of a timely request for administrative review of the INC coupled with a request for suspension or a request for extension of time to comply.

APPEARANCES: Bruce L. Bummer, Production Manager, Timberline Production Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Timberline Production Company appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated July 16, 1985, upholding an assessment of $250 against appellant for failure to abate an Incident of Noncompliance (INC). The BLM decision followed a technical and procedural review conducted at the request of appellant.

On May 14, 1985, Platte River Resource Area, BLM, issued the INC for appellant's failure to place a well-identification sign at one of its wells on lease No. CANRM 680, sec. 26, T. 33 N., R. 86 W., sixth principal meridian, Natrona County, Wyoming, in violation of 43 CFR 3162.6(a). 1/ The INC

1/ 43 CFR 3162.6(a) (1985) required the lessee to:

"[p]roperly identify in a conspicuous place each drilling, producing, or abandoned well, with the name of the operator, the lease serial number,

recited that appellant was given 30 days to correct the violation. On June 7, 1985, BLM received from appellant a copy of the INC used for reporting action taken to abate the violation. Under the heading "Corrective Action Taken," the following notation appeared:

> There is a well sign at the battery which is on the same location. We do not believe that any additional sign is required. Please advise if we are interpreting the regulations in error.

In a handwritten reply to appellant dated the same day, the BLM employee who inspected the site and issued the INC responded to the assertion that no further sign was required:

> My [interpretation] of your particular situation is that one sign is not sufficient since there is more than one tank battery at that location (See sections of memo outlined in yellow). If you disagree, you have the right to appeal. You also could have filed for a technical & procedural review with our state office but the time frames to file for that have already expired.

On June 18, 1985, BLM again inspected the well site. The inspector's report shows that appellant failed to install a well-identification sign within the 30-day deadline set in the INC. Appellant was notified the next day that it was being assessed $250 for noncompliance pursuant to the regulation at 43 CFR 3163.3(a) (1985). 2/ Appellant contested the assessment by

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fn. 1 (continued)
the surveyed description of the well (either footages or the quarterquarter section, the section, township, and range) * * *. The lessee shall maintain all well markings in a legible condition." The wording of this regulation has been revised somewhat in the 1987 revision of the regulations governing onshore oil and gas operations, but the substance has not been altered. See 52 FR 5391 (Feb. 20, 1987).

2/ The regulation at 43 CFR 3163.3, in effect at the time, provided, in pertinent part:

"Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable to ascertain. Except where actual losses of damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance.

"(a) For failure to comply with a written order or instructions of the authorized officer, $250 if compliance is not obtained within the time specified."

This regulatory provision has been revised and recodified in the 1987 regulatory revision, but the substance of the provision (i.e., assessment of $250 for failure to abate a minor violation within the time allowed in the notice) has been retained. See 43 CFR 3163.1(a), 52 FR 5393 (Feb. 20, 1987).

filing a request for a technical and procedural review with the Wyoming State Office, BLM, reasserting the claim that the sign at the nearby tank battery was sufficient to meet the regulatory requirements. 3/

After technical and procedural review the State Office concurred with the BLM inspector's conclusion that an additional sign was necessary at appellant's well site:

> In a situation where there is one well and one tank battery, we will accept one sign as long as it is visible from the well and it includes the information required for both well sign and tank battery identification. According to the inspector and photographs taken during the field inspections, the tank battery signs from [sic] both tank batteries could only be seen on edge from the well.
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> We therefore concur that a separate well sign is required in this situation. [Emphasis in original.]

The State Office further found that appellant's request for a BLM response to appellant's interpretation of the regulation was not justification for overturning the assessment, as appellant had "waited until the time frame to correct nearly expired before requesting advice * * *. In addition, when the inspector's note [responding to appellant's request] was received, the company did not request an extension of time to correct."

In its statement of reasons for appeal, appellant requests the $250 assessment be vacated. Appellant again contends that the sign at the tank battery was sufficient to meet the regulatory requirements. Appellant also notes that the sign was installed after the deadline because the well sign "took a lot longer to complete than is the usual * * *. We regret that we didn't ask for more time to have a sign installed but, at the time, didn't think we would need any additional time."

The issues raised by this appeal are twofold: whether the sign erected in front of the adjacent tank battery constituted compliance with the requirement of 43 CFR 3162.6(a) to have a well-identification sign, and, if not, whether BLM erred in light of the circumstances in refusing to vacate the assessment for failure to timely abate the INC.

It appears from photographs in the record there was, as appellant alleges, a sign identifying the well number, lease number, name of the operator, and geographic location of the well site at the time the INC of May 14,

3/ The record further indicates that on June 26, 1985, appellant abated the INC and complied with 43 CFR 3162.6(a) (1985) by placing a sign at the well site.

1985, was issued. However, it also appears the sign was erected in front of a tank battery associated with the well and would not have been legible (although it was visible) from the adjacent well-site. It also appears there is another tank battery not associated with the well adjacent to the battery identified by the sign. Appellant indicates this battery served a well which has now been abandoned in which appellant held no interest. BLM concluded that the one sign was not sufficient since there is more than one tank battery at the location and the sign was not legible from the well. Although a less strict interpretation of the requirement of 43 CFR 3162.6(a) for a well-identification sign could be argued, appellant has not persuaded us that BLM's interpretation of the requirement is erroneous. Accordingly, the decision appealed from is affirmed to the extent it upheld the INC of May 14, 1985.

[1] This leaves the issue of whether the assessment of $250 in liquidated damages is properly sustained. In order to determine the propriety of the assessment in this case, we first consider the purpose for an assessment. The Board has stated that an assessment under 43 CFR 3163.3 (1985) "is not considered to be either a fine or a penalty. Rather it is in the nature of 'liquidated damages' to 'cover loss or damage to the lessor from specific instances of noncompliance.' 43 CFR 3163.3." Mont Rouge, Inc., 90 IBLA 3, 5 (1985). Under 43 CFR 3163.3(a) (1985) $250 in liquidated damages is to be assessed "[f]or failure to comply with a written order or instructions of the authorized officer * * * if compliance is not obtained within the time specified." Thus, if the lessee or operator receiving the written order fails to comply within the abatement period prescribed in the order, it is proper to assess $250 to cover administrative and other costs to the United States caused by the failure to abate. See 49 FR 37361 (Sept. 21, 1984).

Appellant argues the assessment should be vacated in light of the question whether the tank battery sign was sufficient to comply with the requirement and its good faith effort to install the new sign upon receipt of BLM's clarification of the requirement. Although appellant questioned whether the INC correctly interpreted the regulation at 43 CFR 3162.6(a) (1985) in requiring a separate sign at the well where one already existed at the tank battery, this question could have been promptly resolved as an initial matter by filing a request for technical and procedural review within 10 days of the INC which would have prompted a decision within 10 days thereafter. 43 CFR 3165.3 (1985) (see 43 CFR 3165.3(b), 53 FR 5395 (Feb. 20, 1987)). 4/ Having failed to avail itself of this procedure or to request an extension of time for compliance, appellant ran the risk of assessment for failure to timely abate the INC if the INC is upheld on appeal.

4/ Suspension of the requirement of compliance may also be requested pending technical and procedural review. 43 CFR 3165.3 (1985) (see 43 CFR 3165.3(d), 52 FR 5395 (Feb. 20, 1987)).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

John H. Kelly
Administrative Judge.